United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7374

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

VANESSA TAYLOR, on behalf of herself and all other persons similarly situated,

Appellants,

-against-

CONSOLIDATED EDISON CO of NEW YORK, INC.; CHARLES F. LUCE, individually, and in his capacity as Chairman of CONSOLIDATED EDISON CO. of NEW YORK, INC.; ARTHUR HAUSPURG, individually, and in his capacity as President of CONSOLIDATED EDISON CO. of NEW YORK, INC.; THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; ALFRED E. KAHN, individually, and in his capacity as Chairman of THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; and EDWARD P. LARKIN, CARMEL CARRINGTON MARR, HAROLD A. JERRY, JR., and EDWARD BERLIN, each individually and in his capacity as Commissioner of THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; CONNIE ROHAN, as agent of THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellees.

B

P/S

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES PUBLIC SERVICE COMMISSION, ITS MEMBERS AND AGENTS

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Dated: Albany, New York
November 1976

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BRIEF FOR DEFENDANTS-APPELLEES
PUBLIC SERVICE COMMISSION,
ITS MEMBERS AND AGENTS

This is an appeal by the plaintiff from a decision and order of District Judge Bruchhausen dismissing the complaint herein alleging a violation of 42 U.S.C. Sec. 1983 on the ground that no state action was involved.

THE QUESTIONS PRESENTED

The issues are whether the discontinuance of plaintiff's electric service by Consolidated Edison Company of New York, Inc. involved state action as to which due process requirements of prior notice and opportunity for a hearing were applicable, and whether the decision of the Legislature and the Commission not to require such notice and hearing was a denial to plaintiff of the equal protection of the law.

THE FACTS

The plaintiff, Vanessa Taylor, was an electric customer of Consolidated Edison Company of New York, Inc. (Con Edison) in an apartment at 273 Garden Street, Staten Island, commencing in December 1975. Her service was discontinued by the company on March 12, 1976, reconnected on March 13 and again discontinued on March 15, 1976, by employees of Con Edison, at the meter serving the apartment. The meter is located outside the building in a fenced-in area (A63-A64).*

* A __ refers to plaintiff's appendix.

The company states that its employees had discovered on March 11, 1976 that the seal of the meter had been broken and part of a matchbook inserted in the mechanism to prevent the meter from registering. The employee left a notice containing a company telephone number, stating that there was evidence of tampering and asking that the customer contact the company immediately. According to the company, when the customer had not been heard from by the next day, service was discontinued.* The company states that the service was mistakenly turned on again on March 13, 1976 by emergency forces who were not aware of the tampering, and when the error was discovered, service was again turned off on March 15, 1976 (A22-A24). The company advised plaintiff that service would be restored only if plaintiff paid a $100 deposit and a $100 estimated charge for electric usage (A64).

Plaintiff and her attorney then complained to the staff of the defendant Public Service Commission.

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* Con Edison advised the Commission by letter in July of this year that it had changed its practices in tampering cases involving one and two-family houses and individually metered apartments to give five days' notice that service would be discontinued unless acceptable financial arrangements were made.

Staff, upon determining that the discontinuance of service was for meter tampering, refused to direct that service be restored, and declined to make a further investigation. Later on March 23, 1976, after an appeal to a more senior staff member, staff requested of Con Edison that service be restored while staff looked into the reasonableness of the two $100 charges. Service was restored on March 23 or 24, 1976 (A58-A59, A99-A101).

Plaintiff then instituted this action to enjoin Con Edison from terminating service to herself and others similarly situated unless they are afforded prior notice and opportunity to be heard. The defendants Con Edison and the Commission moved to dismiss the complaint which motion was granted by District Judge Bruchhausen. This appeal followed.

ARGUMENT

I. THERE WAS NO STATE ACTION INVOLVED IN CON EDISON'S TERMINATION OF PLAINTIFF'S ELECTRIC SERVICE.

A. Plaintiff contends (Br., pp. 10-19), despite the directly applicable holding of *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), that the discontinuance

of her service without prior notice and opportunity for a hearing involved state action and that such action constituted a denial of due process by the state. Despite plaintiff's attempts to distinguish *Jackson*, it is controlling on the facts of this case.

In *Jackson*, the petitioner, like the plaintiff in this case, contended that the termination of her service by the serving electric utility, without prior notice and a hearing, constituted state action depriving her of property without due process. The Court observed (p. 350-351):

> Here the action complained of was taken by a utility company which is privately owned and operated, but which in many particulars of its business is subject to extensive state regulation. The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment... Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so... It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of a regulated entity so that the action of the latter may be fairly treated as that of the State itself....

The Court rejected the petitioner's contentions that state action was present because the serving utility was a monopoly, because it provided an essential public service, and because the Commission had approved a tariff which authorized the discontinuance of service. As to this last contention, the Court found (p. 357):

> ...Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into "state action." At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so "state action" for purposes of the Fourteenth Amendment. [Footnote omitted.]

The Court concluded (p. 358):

> All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment.

B. The plaintiff attempts to distinguish *Jackson*, contending that in this state, unlike Pennsylvania, entry upon private property to discontinue service would have been a trespass at common law, and that significant state action was involved when the law was changed by Section 15 of the Transportation Corporations Law to permit such entry (Br., pp. 11-14).

1. Plaintiff's bald contention that "it is well settled that state action is present when a state statute is relied on to legalize conduct that was formerly prohibited" (Br. p. 11) is simply wrong. At most, such a change is only one element to be considered, and several courts have declined to give such a change controlling weight. *James v. Pinnex*, 495 F.2d 206 at 209 (CA5, 1974); *Davis v. Richmond*, 512 F.2d 201 at 203 (CA1, 1975); *Anastasia v. Cosmopolitan Nat. Bank of Chicago*, 527 F.2d 150 at 155-156 (CA7, 1975), certiorari denied ___ U.S. ___; *Brooks v. Flagg Brothers, Inc.*, 404 F. Supp. 1059 at 1065-1067 (District Court S.D.N.Y., 1975).

The cases cited by plaintiff (Br., p. 11) do not support her position. *Reitman v. Mulkey*, 387 U.S. 369 (1967), struck down a California constitutional amendment depriving the state government of any power to

prohibit private discrimination in housing on the basis of race. The amendment had the effect of repealing California laws prohibiting such discrimination. The Court cited with approval (at pp. 376-377) the reasoning of the California Supreme Court, whose decision was upheld, that while the Fourteenth Amendment did not establish any automatic barrier to the repeal of existing legislation prohibiting racial discrimination, the amendment to the California constitution impermissibly established a right to discriminate, "immune from legislative, executive or judicial regulation."

This Court in *Shirley v. State National Bank of Connecticut*, 493 F.2d 739 at 744 (CA2, 1974), certiorari denied, 419 U.S. 1009 (1974), distinguished the *Reitman* case in part on the ground that, where racial discrimination is involved, a lesser degree of involvement by the state is required than where self-help statutes involving property are concerned (as well as on the ground that preexisting law had been changed). While this Court found in *Shirley* that the fact that a statute did *not* change the common law was one factor to consider in holding that no state action was involved, it observed that (p. 745):

> ...the problems involved in determining whether "state action" is present are not susceptible of solution by facile formulae.

Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15 (1973), cited by plaintiff (Br., p. 11), held that state action was involved in the seizure by private persons of property of others under New York's Lien Law because the private individuals were performing traditionally public functions. The Court in *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378 (CA2, 1973), in declaring other provisions of the same law unconstitutional and reversing the lower court, did not discuss the question of state action. The lower court, however, while dismissing the complaint, had conceded that state action was manifest because the lienor "is performing a traditionally public function, pursuant to a right accorded it by a state statute". 346 F. Supp. 313 at 317, footnote 4 (1972). Two of the three judges sitting in *Culbertson v. Leland*, 528 F.2d 426 (CA9, 1975), one concurring and one dissenting, rejected the distinction between rights conferred by common law and those created by later statutory enactment (p. 435, footnote 5, & pp. 436-437). The case struck down a provision of Arizona's Innkeeper's Lien Statute, and the concurring judge was of the opinion that, as in the *Blye* and *Hernandez* cases, *supra*, state action was involved in the seizure by an innkeeper of the property of others, because the

innkeeper was performing a traditionally public function.

2. Furthermore, Section 15 of the Transportation Corporations Law does not *require* any discontinuance of service. It merely states that the utility "may enter into or upon such premises." A mere authorization, as *Jackson* held (p. 357) where the state "has not put its own weight on the side of the proposed practice by ordering it" does not transmute into state action the utility's decision to take advantage of the authorization. That reasoning in *Jackson* has even more force here, where the authorization relied upon by plaintiff is not any authorization to discontinue service as such. The continuation of utility service, rather than immunity of her yard from trespass*, is plaintiff's claimed property right prior to whose discontinuance she claims the right to notice and a hearing. The entry upon private property to cut off service is merely one method, albeit frequently the most convenient one, of discontinuing service. Service could be cut off at the street.

3. Moreover, the utility's right of entry to discontinue service for meter tampering does not arise

* No notice and hearing is required prior to the enactment of a general statute, such as Section 15, Transportation Corporations Law, prescribing uniform rights and liabilities applicable to all.

from Section 15 of the Transportation Corporations Law, but, like *Jackson*, from its tariff and the common law. Section 15 by its terms permits entry upon the premises to discontinue service only for nonpayment of charges after five days' notice. *Morris v Consolidated Edison Co.*, 265 App. Div. 743 (1st Dept., 1943), held that the statute did not apply to a discontinuance of service for meter tampering.

It appears rather that the company's right of entry arises both from its tariff and from common law. However, if we are incorrect in that conclusion and the company's entry was completely unauthorized, there obviously was no state action involved.

Con Edison's tariff (A32) provides:

> The Company's duly authorized representatives shall have the right of access to the premises of the Customer and to all of the Company's property thereon at all reasonable times for the purposes of reading and testing meters, inspecting equipment used in connection with its service, metering the demand, ascertaining and counting the connected load of the Customer's installation, removing its property, or any other proper purpose.

The same page of the tariff prohibits interference by the customer with the operation of his meter. The tariff (A34) also provides for discontinuance of service if the customer fails to comply with that and other rules set forth in the tariff. Those pro-

visions* were binding upon the plaintiff. *W.R. Grace & Co. v. Railway Express Agency, Inc.*, 9 A.D.2d 425 at 429 (1st Dept., 1959); affirmed, 8 N.Y.2d 103 (1960); *Plate v. Southern Bell Tel. & Tel. Co.*, 98 F. Supp. 355 at 358 (U.S. District Court, E.D. South Carolina, 1951). *Jackson* held (p. 357) that the Commission's approval of such a tariff does not turn into state action the utility's implementation of the authorization contained in the tariff.

4. Contrary to the plaintiff's contentions (Br., pp. 12-14), that it was a trespass at common law "to enter on the land of another to take one's own personal property," this was not generally the case where the owner of the personal property "entered peaceably, did not use force or commit a breach of the peace." *Madden v. Brown*, 8 App. Div. 454 at 457 (4th Dept., 1896); *Sheldon v. Sherman*, 42 N.Y. 484 at 487, 488 (1870); *Scribner v. Beach*, 4 Denio 448 (Sup. Ct., 1847); 1 Harper & James, *Torts*, Sec. 1.17.

Several of the cases cited by plaintiff involved entries to discontinue service for nonpayment which

* We have found no indication in our files that there was any action by the Commission in respect to these tariff provisions, except as they deal with discontinuance for nonpayment of bills discussed at p. 17, *infra*, other than to allow them to become effective as filed.

would have been authorized by the Transportation Corporations Law, except that force was used to gain entry. The courts held that the forceable entry made the utility a trespasser, the same result which would have obtained at common law. *Reed v. New York & Richmond Gas Co.*, 93 App. Div. 453 (2nd Dept., 1904); *Velardi v. Consolidated Edison Co.*, 63 M.2d 623 (Sup. Ct., N.Y. Co., 1970). Similarly, *Newkirk v. Sabler*, 9 Barb. 652 (Sup. Ct., 1850), which involved the use of force held that liability for trespass resulted therefrom.

Goblet v. New York Power & Light Co., 267 App. Div. 1030 (3rd Dept., 1944); and *Dobbs v. Northern Union Gas Co.*, 78 Misc. 136 (App. Term, 1st Dept., 1912), merely held that where there are no payments due the utility, entry on the premises to discontinue service for nonpayment, having no justification, is a trespass.

Fortesque v. Kings County Lighting Co., 128 App. Div. 826 (2nd Dept., 1908), held that in failing to exhibit a written authorization as required by the Transportation Corporations Law (present Section 14) before entering and replacing a meter, the utility's agent committed a technical trespass. The court did not further explain its holding, but it is consistent

with the view that the preconditions to entry in the Transportation Corporations Law are mandatory and narrow the rights the utility would have had at common law. Also involved was the unauthorized entry into a house, and not merely the outdoor parts of the premises, without permission of the owner. *Brissette v. Consolidated Edison*, New York Law Journal, April 26, 1976, p. 6, col. 1 (App. Term, 1st Dept.) followed *Fortesque*.

Goff v. Kilts, 15 Wend. 550 (Sup. Ct., 1836), involved the law applicable to escaped animals *ferae naturae* (a swarm of bees), where the right of recapture from another's property was apparently different from the right to recapture other property. *See Sheldon v. Sherman*, 42 N.Y. 484 at 487, 488 (1870). In two other old cases cited by plaintiff, *Heermance v. Vernoy*, 6 Johns. 5 (Sup. Ct., 1810), and *Blake v. Jerome*, 14 Johns. 406 (Sup. Ct., 1817), the personal property taken was found actually to be that of the owner of the land, in the first case force was used, and in the second, the potential for a breach of the peace existed since the plaintiff, the owner of the land, had expressly forbidden the defendant to enter.

C. Plaintiff (Br., pp. 14-17) also purports to find state action because of the extensiveness of state involvement with and supervision over the company, not only with respect to its overall operations, but also with respect to its procedures for terminating electric service. The contention that extensive state regulation was sufficient to constitute state action was considered and rejected in *Jackson*, where the Court held (419 U.S. at 350):

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment... Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so.

The power of the Commission, cited by plaintiff, over tariff filings,* rules, regulations, contracts, service, complaints and of general supervision, and the requirements of the Public Service Law applicable to the utilities in the state (Public Service Law, Sections 65(1), 66(1)(5)(12), 71, 72) are substantially duplicated (and in some instances perhaps exceeded) in

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* Rates, regulations and the like may become effective 30 days after their filing, under Section 66(12), Public Service Law, unless the Commission suspends them. The statute contains no requirement of the "active approval" mentioned by plaintiff (Br., p. 14).

the Pennsylvania statute. (66 Penn. Statutes Annotated, Sections 1141, 1142 and 1148 - relating to rates and tariffs; Sections 1183, 1391, 1392, 1393 and 1395 - complaints; Sections 1341 and 1342 - general supervision; Sections 1171 and 1182 - service; Sections 1184 and 1360 - contracts.) *Jackson* held that the extensive powers contained in that statute were insufficient to convert utility action into state action.

Plaintiff refers (Br., p. 15) to the note at the bottom of Con Edison's tariff leaf 19A relating to discontinuance of service (A34) stating that it was issued under authority of Opinion No. 73-20 and order of the Commission dated July 10, 1973. The order referred to is published at 13 NY PSC 1038 and directed the filing by Con Edison of tariffs to provide compensation for losses due to distribution system interruptions. Prior to that order, the liability provisions and the service discontinuance provisions both appeared on Leaf 19 of the tariff. The lengthy clause ordered by the Commission necessitated moving the discontinuance provisions to a new leaf, Leaf 19A. The Commission's July 10, 1973 order had no substantive bearing at all on the discontinuance provision. The order authorized the new filing it had ordered to become effective on one day's notice. Mechanically

this also involved moving the old discontinuance provisions to a new leaf, which was the reason for the notation on the bottom of that leaf.

Part 143 of the Commission's rules (A78-A81) cited by plaintiff (Br., p. 15) relates solely to discontinuance of service for nonpayment, and has no bearing on discontinuance of service for meter tampering. The provisions of Con Edison's tariff filed in compliance with Part 143 and Section 116, Public Service Law, also relates solely to discontinuance of service for nonpayment (A34, Section 15(c)).

Part 11 of the Commission's rules (A76-A77), also relied on by plaintiff (Br., p. 15) for the most part is merely a general description of the methods used by the Commission in handling complaints and does not in any way prescribe, authorize or regulate discontinuance of service for meter tampering.

Howell v. Consolidated Edison (Br., p. 16) involves the question of who should be liable for current supplied by Con Edison to a customer's meter in a multiple dwelling and then diverted by a third person after usage has been registered on the meter. That is a substantially different issue from the issue of the conditions upon which service may be

discontinued to the customer as a result of meter tampering.

D. Plaintiff argues also (Br., pp. 17-19) that the Commission, in its handling of the plaintiff's complaint, "affirmed" Con Edison's action, "actively involved itself" and "actively supported" Con Edison's actions, and "cooperated" in terminating the plaintiff's service. The facts are that plaintiff and her attorney at various times complained to various staff members of the Commission, after the event, of the termination of her service by Con Edison for meter tampering. Staff declined at first to take any action with regard to the complaint but later requested of the company that service be restored. Staff advised the plaintiff that the company, prior to discontinuing service for alleged meter tampering, was not required to meet the notice and other requirements of Section 15, Transportation Corporations Law, and Part 143 of the Commission's rules and regulations applicable to discontinuance of service for nonpayment of bills. No state action was involved; rather the staff's response was a refusal to act. The only affirmative action taken was to request restoral of service, which in no way supported, affirmed or cooperated in Con Edison's prior action in discontinuing service.

Under the reasoning in *Jackson* (p. 357), no state action can be spelled out from the Commission's nonaction in this case:

> At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so "state action" for purposes of the Fourteenth Amendment.[*]

II. PLAINTIFF WAS NOT DENIED THE EQUAL PROTECTION OF THE LAW.

Plaintiff's contention (Br., pp. 24-26) that she was denied equal protection of the laws because customers are entitled to notice and, if requested, review by the Commission prior to termination for non-payment but not prior to termination for meter tampering, is without merit. Section 15, Transportation

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* Since their is no state action involved in Con Edison's discontinuance of plaintiff's service, plaintiff's contention that such discontinuance deprived her of property without due process is without merit. Even if this Court found that there were state action, some of her claims, including the nature and type of hearing to which she would be entitled, were never reached by the trial court, and should be decided by that court on remand. The same is true of plaintiff's contention that this action should be certified as a class action.

Corporations Law, makes the distinction, and the Commission's rules in implementing that section carry forward that same distinction. The Legislature and the Commission quite reasonably could conclude that the utilities should be given greater latitude to act promptly to stop theft of service, a crime (Penal Law, Section 165.15(5))*, than in the case of the refusal or neglect to pay bills, and that a five-day period of grace in the former case would unduly condone wrongdoing and encourage or reward the wrongdoer.** That Con Edison elects, in lieu of outright termination, to give the customer the choice of paying a deposit and the charges for the misappropriated energy does not vitiate this ground for distinction. The requirement for prompt restitution for wrongdoing provides more assurance that the company will not suffer or the customer benefit therefrom.

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* That law, as amended by L. 1976, Chapter 768, made the fact of tampering presumptive evidence that the customer served thereby had done the tampering. A similar provision formerly in the Penal Law was interpreted as creating a similar presumption in civil suits. *Eff-Ess, Inc. v. New York Edison Co.*, 237 App. Div. 315 (1st Dept., 1932).

** Section 15, Transportation Corporations Law, also does not restrict the gas and electric companies' right to cut off service to avoid dangerous conditions, such as a gas leak in the house.

In addition, so far as the Commission's investigatory practices are concerned, under which the Commission declines to determine the merits of the company's claims of meter tampering, but will investigate the merits of billing disputes, the difference in treatment is warranted by the nature of the issues. The issue involved in meter tampering is largely one of credibility, the customer's word versus the inferences to be drawn from the circumstances. The Commission can contribute little, if anything, to the resolution of such disputes. The issue is really one for a jury and the courts. In billing disputes, on the other hand, the Commission has a staff of experts in such matters as meter accuracy and the interpretation and application of tariffs. In such cases, the Commission can frequently be of real help, whether in assuring the customer that his bill is correct, or in providing relief where it is not.

CONCLUSION

The judgment and order of the District Court dismissing the complaint should be affirmed.

Respectfully submitted,

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Dated: Albany, New York
November 1976

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

VANESSA TAYLOR, on behalf of herself and all other persons similarly situated, Appellants, -against- CONSOLIDATED EDISON CO. of NEW YORK, INC.; CHARLES F. LUCE, individually and in his capacity as Chairman of CONSOLIDATED EDISON CO. of NEW YORK, INC.; ARTHUR HAUSPURG, individually, and in his capacity as President of CONSOLIDATED EDISON CO. of NEW YORK, INC.; THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; ALFRED E. KAHN, individually, and in his capacity as Chairman of THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; and EDWARD P. LARKIN, CARMEL CARRINGTON MARR, HAROLD A. JERRY, JR., and EDWARD BERLIN, each individually and in his capacity as Commissioner of THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; CONNIE ROHAN, as agent of THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, Appellees.	AFFIDAVIT OF SERVICE C.A. Docket No. 76-7374

STATE OF NEW YORK :
: SS.
COUNTY OF ALBANY :

LORETTE T. SMITH, being duly sworn, deposes and says that she is over the age of eighteen years, that on the 5th day of November, 1976, she served two copies of the annexed Brief for Defendants-Appellees Public Service Commission, Its Members And Agents, on the persons listed below by depositing said copies,

properly enclosed in postpaid envelopes addressed as indicated below, in a mailbox maintained by the Government of the United States, in the City and County of Albany, State of New York:

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Lovette T. Smith

Sworn to before me this
5th day of November, 1976.

Cornelius J. Milmoe

CORNELIUS J. MILMOE
Notary Public, State of New York
Qualified in Columbia County
My Commission Expires March 30, 1977